Case No. 80-795

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1980

MICHAEL HEFFRON, ET AL.,
Petitioners,

V.

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,
ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF MINNESOTA

Brief Amicus Curiae Of The State Of Ohio In Support Of The Petitioners

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BRIEF AMICUS CURIAE OF THE STATE OF OHIO IN SUPPORT OF THE PETITIONERS

The State of Ohio, by and through the Attorney General of Ohio, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief as Amicus Curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

The State of Ohio submits that the questions presented in this action are of national importance and that the decision rendered by this Honorable Court will have far reaching consequences for the State of Ohio as well as her sister states.

More particularly, the State of Ohio, like most or all other states, conducts an annual State Fair and, to a lesser extent, is concerned with the operation of "county" and other "local" fairs.[1] The Ohio State Fair, like the Minnesota State Fair, utilizes a so-called "booth rule" which serves to prohibit "roving solicitation" by requiring that all solicitations for either contributions or sale must be conducted from a particular fixed location on the fairgrounds.[2]

The Ohio "booth rule" has also been challenged by the International Society For Krishna Consciousness (hereinafter, ISKCON) with said challenge being heard by the United States District Court For The Southern District of Ohio on August 23, 1977. *See International Society for Krishna Consciousness v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977).[3]

In the *Evans* case the Federal District Court upheld the constitutionality of Ohio's "booth rule" and summarized its reasoning as follows:

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[1]The State of Ohio is directly involved in the operation of the Ohio State Fair through the Ohio Expositions Commission (hereinafter, Expo). Expo is the state agency which has been created by the State Legislature for the purpose of conducting the Ohio State Fair and maintaining and managing the state fairgrounds. Ohio Revised Code Sections 991.02 and 991.03.

In addition the State of Ohio is indirectly involved in the operation of county and other local fairs by virtue of the fact that they are governed by the rules of the Ohio Department of Agriculture. Ohio Revised Code Section 1711.11. These are the same rules utilized by the Ohio Expositions Commission and, of course, the "no roving solicitation rule" or "booth rule" is identical.

At this time the fairgrounds are not on a constitutional plane with an open-air park or street corner 'immemorially . . . held in trust for the use of the public, and, time out of mind, . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. Committee For Industrial Organization,* 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939). Nor can a strong parallel be drawn between the Ohio State Fair and a facility in which the intercommunication of ideas is an important aspect of the process to which the facility is dedicated. *See generally Tinker v. DeMoine Independent Community School District, supra.*

Balancing all of these factors, this Court concludes that the system of rental booths adopted by the Ohio Expositions Commission offers the best available means of accommodating the conflicting interests of the exhibitors in free

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[2]The current Ohio rule actually consists of a combination of two separate rules which provide as follows:

901-7-06 Every concessionaire and agent shall work only in front of his own concession and shall not be over four (4) feet from his concession while working at the fair.

901-7-22 No roving vendor or solicitor, acting for either a profit or non-profit organization or on his own behalf, shall be permitted on the fairgrounds except within the immediate area of the grandstand or coliseum for the purpose of vending food and soft drinks for the benefit of patrons attending scheduled events in the grandstand area or coliseum. The selling of official fair or race programs [in the immediate area of the grandstand or coliseum] by an agricultural society, the Ohio Expositions Commission or anyone contracting with an agricultural society or the Ohio Expositions Commission to sell official fair or race programs shall be exempt from this regulation. All solicitations for either contributions or sale must be made from within the confines of a booth or display unless otherwise exempted by this rule or rule 901-7-06 of the administrative code.

> speech, the fairgoers in access to communicated material, all fair participants in a minimum of congestion on major thoroughfares at the fairgrounds, and the people of the State of Ohio in an annual exposition of their agricultural and industrial achievements and in educational, competitive, and recognitional programs for youth.

ISKCON v. Evans, 440 F. Supp. 414, 425 (1977).

A comparison of the facts developed during litigation of the Minnesota State Fair case with the facts developed during litigation of the Ohio State Fair case will demonstrate the striking similarity between the nature of the two fairs and the "booth rule" utilized by each fair.

Thus, the State of Ohio has a direct and substantial interest in this Court's final decision herein.

SUMMARY OF THE ARGUMENT

It is beyond dispute that a state is free to regulate the time, place, and manner of First Amendment activity

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[3]The wording of Ohio's current "booth rule" as set out in footnote number one, *supra*, is slightly different from the way it was worded at the time *ISKCON v. Evans* was decided, but the alteration was one of form not substance. For a comparison, *see ISKCON v. Evans*, 440 F. Supp. 414, *at* 417.

It should also be noted that the term "booth rule" is somewhat of a misnomer in that it includes more than use of a booth or similar structure. The "booth rule" operates to require an individual or organization that chooses to participate at the State Fair (other than fair patrons) to acquire a certain specific physical location upon which may be placed such things as a food concession, a ride, a game, a novelty concession, a display of some sort, a tent or even an act of some sort. Thus, if ISKCON were willing to participate at the State Fair on the same terms and conditions as any other organization it would not necessarily be required to operate out of the confines of any particular structure and would, in fact, have various options available for meeting and mingling with the public. It would even have the option of obtaining several different (albeit, specific) locations around the fairgrounds.

generally in the interests of the public health, safety, welfare, peace, and comfort. The regulation at issue herein is the so-called "booth rule" which is basically a place and manner regulation. Where religious conduct is allegedly being restricted via operation of a facially neutral governmental regulation designed to serve an important societal interest, a court must employ a delicate balancing test to determine whether the governmental regulation involved is reasonable and does, in fact, serve a substantial or important societal interest so as to not run afoul of the constitutional free exercise rights of individuals.

In addition, when utilizing its balancing test, a court must take into consideration the nature of the forum and the conflicting interests involved in order to properly determine the extent of protection which should be afforded by the First Amendment to the speech or conduct involved. The State of Ohio submits that a fairgrounds is a truly unique forum and that application of the long standing "booth rule" is both a reasonable and a necessary regulation of conduct having nothing whatsoever to do with anyone's beliefs, including those of ISKCON members. It is further submitted that application of the "booth rule" does not foreclose meaningful participation by ISKCON or any other organization at a fair and, further, in the long run actually enhances all persons' opportunity to participate. In fact, the rule only places minor restrictions on ISKCON's various religious practices and without such a rule all degree of order at any fair would be in serious jeopardy as would the existence of the fair itself. The very *raison d'etre* of the "booth rule" is to provide enough order upon a fairgrounds so as to enable the multitude of participants to have some degree of equal and uninterrupted access to each other.

Amicus submits that a proper application of both First and Fourteenth Amendment principles compels the con-

clusion that ISKCON is not entitled to any special status on a fairgrounds. All that Amicus seeks is to be allowed to deal with ISKCON on the same basis as it does with any other organization operating on the State Fairgrounds. Amicus submits that it is reasonable and constitutionally proper to require ISKCON to adhere to the same terms and conditions as any other organization which chooses to participate in the State Fair. This will result in equal treatment for all and will afford ISKCON members the right to proselytize in a manner which will provide them with reasonable and equal access to all fair patrons.

The State of Ohio further submits that in taking all of these relevant factors into consideration this Court should conclude that utilization of the "booth rule" is both necessary and constitutional.

ARGUMENT

A NONDISCRIMINATORY "BOOTH RULE" UTILIZED BY A STATE FAIR, OR BY ANY FAIR OR SIMILAR ENTERPRISE, SERVES A LEGITIMATE AND SIGNIFICANT PUBLIC INTEREST AND IS A NECESSARY AND REASONABLE TIME, PLACE, AND MANNER REGULATION CONSISTENT WITH FIRST AMENDMENT STANDARDS.

1. An Examination Of The "Booth Rule"

The booth rule is a device which has been developed for use at fairs as a result of historical experiences which demonstrate the necessity for having a rule which will create some semblance of order out of a situation that would otherwise be thoroughly chaotic. In Ohio, as in many other states, the so-called "booth rule" or "no roving solicitation rule" was developed, was in place, and was enforced at the Ohio State Fair long before ISKCON

approached the Fair seeking special exception from its application. *See ISKCON v. Evans,* 440 F. Supp. 414, 418 (1977). Further, application of the booth rule does not bar ISKCON members, nor anyone else, access to a particular fairgrounds or to a significant percentage of patrons who choose to purchase a ticket and attend the fair. For example, the evidence offered during the trial in *ISKCON v. Evans, supra,* indicated that the booth facilities or specific location offered by the management of the Ohio State Fair to ISKCON would have afforded ISKCON members access to a minimum of 300,000 to 500,000 fair patrons over the duration of the fair.[4] *Id.,* 440 F. Supp. 414, 420.

Additionally, ISKCON did not allege discrimination, and this Court should be aware of the fact, that ISKCON was not being discriminated against. As a matter of fact, it would have been treated like any other organization seeking to solicit, sell, or otherwise do business on the fairgrounds. Nor was there a state official exercising any kind of discretion regarding the content of ISKCON's message or materials or whether ISKCON was entitled, as an organization, to admittance and participation at the fair. As a matter of fact, in both Ohio and Minnesota, no official of the fair management ever questioned the religious beliefs or motives of ISKCON's members. Thus, it is beyond dispute that application of the booth rule is intended to regulate only conduct (and then only to a very limited extent). Also, it is definitely not a form of "prior restraint" and has nothing whatsoever to do with the regulation of religious beliefs. *See also International Society For Krishna Consciousness v. Barber, et al.,* No. 77-CV-328 (N.D. N.Y., filed August 25, 1980), *at* 32-33.

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[4]Note that this figure is based on the assumption that ISKCON would only ask for and receive one specific location but there is no prohibition against obtaining more than one "booth space" or location.

In this action the only real dispute is whether Petitioners are entitled to require ISKCON members to maintain themselves in a stationary location upon the fairgrounds if and when they wish to engage in the practice of distributing and selling religious literature and soliciting donations for their cause. Thus, the Petitioners are merely attempting to regulate conduct on the part of ISKCON members; they are not prejudging ISKCON members' beliefs or imposing any prior restraint upon ISKCON members' actions upon the basis of their religious beliefs. ISKCON, in effect, seeks exemption from application of these regulations which would provide it with a unique or exaulted status on a fairgrounds if they were afforded this special status.[5]

In reviewing or examining the booth rule as it relates to any fairgrounds it is extremely important to recognize the unique character and nature of a fair. As this Court recognized in *Grayned v. City of Rockford,* 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 222 (1972), different types of public places present different considerations in assessing the reasonableness of regulations placing incidental limitations on First Amendment activity. Therefore, cases concerning the reasonableness of regulations governing public streets, sidewalks, office buildings, parks, bus terminals or airports are not dispositive when considering the constitutionality of regulations designed to regulate activity at a fairgrounds. This is true because the

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[5]Of course, if this Court were to determine that the "booth rule" cannot withstand ISKCON's First Amendment challenge it is obvious that all other persons similarly situated would be equally entitled to ignore the requirements of the "booth rule". Amicus submits that this would result in certain chaos and would seriously undermine the operation of any fair. Examples would include, but would not necessarily be limited to, all other persons who wished to solicit funds for any religious cause, politicians soliciting signatures for any sort of petition and persons or groups wishing to engage in various types of peaceable assembly (demonstrations).

forum is distinctly unique and the regulations are designed to serve radically different functions in a setting which presents even more serious problems regarding crowd density and behavior than are present in any of the previously described public facilities.* Further, a fair is comprised of patrons and concessionaires who have paid to participate in the operation of the fair, as such, these participants have rights different than those of persons walking down the sidewalk, through an airport, in a park, or through other types of public places.

The Ohio State Fair, as more fully described in *ISKCON v. Evans, supra,* is a virtual "beehive" of activity. For example, in the *Evans* case it was demonstrated that on any given day there would be approximately 175,000 visitors in attendance in an area of approximately 70 acres, all of whom would be interacting with over 1000 exhibitors throughout this area which contains in excess of 50 separate buildings housing over 30,000 exhibits, booth space, storage and display facilities. *Id.*, 440 F. Supp. 414, 424. Obviously, any degree of understanding of the situation which exists at a fair compels the conclusion that some form of regulation is necessary, and as the *Evans* court stated it "compels the conclusion that Expo's [the management agency of the Ohio State Fair] regulations are constitutionally proper." *Id. at* 424. The Court in *Evans* described in the Ohio State Fair's booth rule system as follows:

> The method which has been adopted by Expo is a system of booths available for rental to prospective exhibitors on a nondiscriminatory basis and without regard to the content of the exhibitors message (there are certain statutory

*This is not intended to imply that other heavily populated facilities have no need for such regulation but rather that such regulation is *inherently* and absolutely necessary for the actual operation of a fair.

> restrictions not relevant herein). Exhibitors are permitted to work within a restricted space around their individual concessions as well. This method guarantees each exhibitor a specific area where he is free from interference from other exhibitors and where he may communicate his message to passersby without interruption. At the same time, by restricting exhibitors to the immediate area of their booths, and then locating these booths outside of major thoroughfares, the general interest in protecting the free flow of traffic and providing untrammeled access to specific areas is advanced. Although a fee is charged for the rental of this booth space, this court has already determined that such a fee is not constitutionally improper since its purpose is simply to defray expenses resulting from the exhibitors' activities.

ISKCON v. Evans, 440 F. Supp. 414, 424.

The *Evans* court went on to note that the mode of speech being regulated was that of solicitation, and further that in addressing the constitutionality of the booth rule it was required to balance the interests of all persons concerned, *i.e.*, the ISKCON devotees, the fair patrons who purchased a ticket to attend the fair, the various commercial and noncommercial concessionaires who have invested time and money to participate at the fair, and the state, through the Ohio Expositions Commission (its fair-management agency), which has certain rights and also has certain duties and obligations to all of the above referenced parties. The *Evans* court, in utilizing this balancing test, held as follows:

> Balancing all of these factors, this Court concludes that the system of rental booths adopted by the Ohio Expositions Commission offers the

> best available means of accommodating the conflicting interests of the exhibitors in free speech, the fairgoers in access to communicated material, all fair participants in a minimum of congestion on major thoroughfares at the fairgrounds, and the people of the State of Ohio in an annual exposition of their agricultural and industrial achievements and in educational, competitive, and recognitional programs for the youth.

ISKCON v. Evans, 440 F. Supp. 414, 425.

Thus, it is fair to say that the booth rule is itself a balancing mechanism—an absolutely necessary device used to snatch a necessary degree of order from the jaws of what would otherwise be chaos. Fair patrons pay to attend the fair, *i.e.,* they enter into a contract with the management of the fair intending to obtain whatever entertainment they can for themselves and their children from its operation. Such people expect and are entitled to some necessary degree of regulation which inherently contains aspects of crowd control, traffic control, concessionaire control, control of fraud and deceit, safety control, and other types of rules and regulations which will assure them that they are able to move about, eat, participate in the games and other concessions, ride the amusement rides and do all of the other kinds of things that one does at a fair for the purpose of being entertained. Simply stated, people wish to do and are entitled to do all of the things of *their choice* that come to mind when one "goes to the fair". Without the booth rule regulation it is conceivable that fair patrons would spend more time fending off various types of "solicitors" than they would doing the things they went to the fair for in the first place. *See generally ISKCON v. Barber, supra, at* 40-41. *See also Lehman v. City of Shaker Heights,* 418 U.S. 298, 304, 94 S. Ct. 2714, 2718, 41 L. Ed.2d 770 (1974).

2. An Examination Of Relevant First Amendment Principles

Since *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the proposition that a state may regulate the time, place and manner of conduct, including religious solicitation, has not been open to serious question. As the *Cantwell* court observed:

> . . . the [First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.
>
> * * *
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> It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading in liberties protected by the Fourteenth Amendment

Id., 310 U.S. 296, 303, 304, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218.

Addressing itself specifically to the issue of solicitation, the Court in *Cantwell* fully clarified that a state is quite free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience, by stating:

> The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection

> be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible barrier to the exercise.

Id., 310 U.S. 296, 305, 60 S. Ct. 900, 904, 84 L. Ed. 1213, 1218.

The principle, recognized by this Court in *Cantwell, supra,* that a state is free to regulate the time, place and manner of First Amendment activity generally in the interests of the public peace, comfort, convenience or safety, has been applied in a variety of factual contexts. *See e.g., Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), holding that a child labor ordinance could be validly applied to prohibit the sale of religious literature by a minor. Clearly, the state's interest in maintaining a free flow of traffic in public places is sufficient to support statutes or regulations which place incidental limitations on First Amendment activity. *Cox v. Louisiana,* 379 U.S. 559, 574, 85 S. Ct. 476, 485, 13 L. Ed. 2d 487, 498 (1965); *Chicago Area Military Project v. Chicago,* 508 F. 2d 921, 926 (7th Cir. 1975).

Like the regulations viewed with approval by the *Cantwell* court in the above quoted passages, the booth rule is designed to promote the public peace, safety, comfort and convenience. Moreover, the booth rule, like the regulations receiving the approval of the Court in *Cantwell v. Connecticut, supra,* does not involve any religious test or impose a "flat license tax" on the exercise of religion, and it does not place unbridled discretion in the hands of state fair officials regarding the matter of whether or not to issue a permit. As such, the booth rule is distinguishable from those regulations considered in many cases cited as authority by ISKCON.

Accordingly, the instant case does not present the same considerations as cases involving regulations which absolutely and flatly prohibit certain First Amendment activities, *Schneider v. State,* 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939), *Hobbs v. Thompson,* 448 F. 2d 456 (5th Cir. 1971), or regulations which require persons to obtain a permit or the specific approval of certain public officials prior to engaging in specified activities, *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943), *Lovell v. Griffin,* 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938), *Kuszynski v. Oakland,* 479 F. 2d 1130 (9th Cir. 1973), *Wolin v. Port of New York Authority,* 392 F. 2d 83 (2nd Cir. 1968), *International Society For Krishna Consciousness v. New York Port Authority,* 425 F. Supp. 681 (S.D. N.Y. 1977), *Washington Free Community, Inc. v. Wilson,* 334 F. Supp. 77 (D. D.C. 1972).

Similarly, the booth rule issue does not present a case involving regulations which are vague or uncertain in meaning or which call for the exercise of official discretion in determining whether or not to issue a license or permit without providing clear standards to guide officials in the implementation of the regulation. *See e.g., International Society For Krishna Consciousness v. Rockford,* 425 F. Supp. 734 (N.D. Ill. 1977), *Washington Free Community, Inc. v. Wilson, supra.* Nor is the booth rule comparable to the anti-picketing ordinances considered in *Grayned v. Rockford,* 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), or *Police Department v. Mosley,* 432 F. 2d 1256, *aff'd.* 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972), in that the booth rule does not fail to attempt to balance the individual's rights with the state's legitimate interests. In contrast with the arbitrary prohibitions imposed by the ordinances considered in *Police Department v. Mosley, supra,* and *Grayned v. Rockford, supra,* the booth rule

does not strive to create a buffer zone, insulating fair patrons from members of ISKCON, nor does ISKCON allege that compliance with the booth rule would have such an effect. Moreover, the booth rule does indeed strike a balance between the desire of persons and organizations for contact with the public and the interest of the state in promoting the safety, comfort, and convenience of all persons attending the fair.

The final matter to address in regard to general First Amendment principles is the question of what test a court should employ in deciding the constitutionality of the booth rule. And, of course, in applying the required legal test, the Court must pay particular attention to the nature of the forum and any conflicting interests involved. As will be more fully discussed *infra,* the Minnesota Supreme Court erred significantly in regard to both of these principles.

In *Heffron v. ISKCON,* the Minnesota Supreme Court paid lip service to the proposition that a regulation such as the booth rule is constitutional if it "furthers an important or substantial governmental interest" and even cited *United States v. O'Brien,* 391 U.S. 367, 377 (1968), for this proposition. *Id., at* A-6, Petition For Writ of Certiorari. The Minnesota Supreme Court then went on to state as follows:

> We agree that these facts [in the Minnesota case] suggest a situation in which the state's interest in maintaining order is substantial. We have no doubt that Rule 6.05's requirement that all vendors, exhibitors, and concessionaires perform their functions at fixed location furthers that interest significantly.
>
> What defendants must demonstrate, however, is not the importance of the state's undeniable interest in preventing the widespread dis-

> order that would surely exist if no regulation such as Rule 6.05 were in effect. Rather, they must establish the importance of the state's interest in avoiding whatever disorder is likely to result from granting members of ISKCON an exemption from compliance with the rule.

Heffron v. ISKCON, at A-7, Petition For Writ of Certiorari.

What this clearly demonstrates is that the Minnesota Supreme Court created its own test regarding the constitutionality of the booth rule, thus ignoring the constitutional principles set out in cases like *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941), and *International Society For Krishna Consciousness v. Eaves*, 601 F. 2d 809 (5th Cir. 1979). Further, the Minnesota Supreme Court appears to have placed great emphasis on the proposition that the Minnesota State Fair failed to prove that it could not maintain some degree of reasonable order if ISKCON were granted an "exemption" from application of the booth rule rather than focusing upon the nature of a fair and determining whether the booth rule made any significant or substantial contribution to some combination of important governmental ends so as to outweigh its alleged restrictive effects on ISKCON's First Amendment rights. *See ISKCON v. Heffron, at* A-6-A-7, Petition For Writ of Certiorari. This narrow view of the "nature of the forum" (a fair) *per se* limited the court's ability to properly "balance" the various rights involved in deciding the reasonableness, propriety, and constitutional validity of the booth rule. Ultimately, by failing in this regard, the Minnesota Supreme Court was unable to carry out its proper function because in deciding

such issues a court must decide whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *See Grayned v. City of Rockford,* 408 U.S. 104, 116, 92 S. Ct. 2294, 2303, 33 L. Ed. 2d 222 (1972). It is the position of Amicus that engaging in roving solicitation upon a fairgrounds is basically and absolutely incompatible with the normal activity of participants at the fair and to allow otherwise would be destructive, unreasonable and unnecessary.

Thus, it is the position of Amicus that the proper test of constitutionality of the booth rule is whether it is "reasonable" in application and whether it "furthers an important or substantial governmental interest." Further, in applying this test of constitutionality the Court should "balance" the interests of *all* persons involved with due consideration being given to the nature of the forum and what is, as well as what is not, compatible with normal activity at such "forum". Amicus submits that the Minnesota Supreme Court failed in all of these respects in *Heffron v. ISKCON.*[7]

3. The "Booth Rule" Is Reasonable, Serves Significant Public Interests, And Is Constitutional.

One very interesting aspect of the booth rule is that it has long been a successful and integral part of the operation of fairs and was in effect long before ISKCON approached

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[7]*See also, ISKCON v. Bowen, supra,* 456 F. Supp. 437, 443, wherein the court stated "|w|e are not faced in the instant case with a situation where the court must *balance* competing fundamental interests." The *Bowen* court also stated that "|t|he fact that admission is charged to gain entrance to the particular 'public forum' is of no consequence." *Id., at* 442, *aff'd.,* 600 F. 2d 667 (1979).

Amicus submits that the *Bowen* court also failed in all respects to apply the proper legal principles in addressing the constitutionality of the booth rule.

either the Ohio or Minnesota State Fairs. In fact, in Ohio, it was in place long before the first member of the International Society For Krishna Consciousness ever set foot in the United States. *See generally, ISKCON v. Barber,* No. 77-CV-328, *supra, at* 7, and, *ISKCON v. Evans, supra,* 440 F. Supp. 414, 418. Obviously, the booth rule is not a regulation created for and directed toward a particular recently discovered "problem". Additionally, the booth rule is utilized in a truly peculiar and unique setting, *i.e.,* a fairgrounds. In view of all of these considerations, it is imperative that a reviewing court attempt to balance the rights of all persons involved and be wary of placing undue weight upon any prior case having nothing to do with a fairgrounds because "the nature of the forum" is truly distinguishable.

This Court should, of course, jealously guard all persons' First Amendment rights, but in approaching this inquiry in the context of the booth rule the Court should be fully cognizant of the nature of the forum involved and what is actually being regulated by the application of the booth rule. The Court should also take a common sense approach in its consideration. It is apparent that this is what the District Courts ultimately did in both *ISKCON v. Evans, supra,* and *ISKCON v. Barber, supra.* It is equally apparent that this is what the Minnesota Supreme Court failed to do in *Heffron v. ISKCON* and what the District Court failed to do in *International Society For Krishna Consciousness v. State Fair of Texas,* 461 F. Supp. 719 (N.D. Tex. 1978). For example, the Court's view of the nature of a fair in *ISKCON v. State Fair of Texas, supra,* as being a "congeries of hawkers, vendors of wares and services, and purveyors of ideas" constitutes a rather jaded view of what a fair is all about. *Compare, ISKCON v. Evans, supra,* 440 F. Supp. 414, 424-425.

Other courts are prone to place almost total emphasis on ISKCON's alleged rights and beliefs without making any meaningful effort to balance the rights of all other persons involved. This was evident throughout *Heffron v. ISKCON* as well as throughout the analysis contained in *International Society For Krishna Consciousness v. Bowen*, 456 F. Supp. 437, 443, *aff'd.*, 600 F. 2d 667 (7th Cir. 1979), *cert. den.*, 444 U.S. 963, 100 S. Ct. 448, 62 L. Ed. 2d 375 (1979).

Another very subtle, yet distinct issue, which has received various degrees of judicial consideration in the many ISKCON cases throughout the country, concerns the question of what the practice of Sankirtan actually means or actually entails. For example, in *Heffron*, the Minnesota Supreme Court stated:

> If Sankirtan is to be practiced properly, the various activities included in the practice of Sankirtan must be performed in a peripatetic manner. Members of ISKCON therefore have a special claim to an exemption from Rule 6.05 on free exercise grounds. Commercial vendors of literature can make no similar claim.
>
> Defendants argue that the facts as stipulated by the parties do not establish that Krishna Consciousness requires its followers to perform all of the activities comprising Sankirtan in a peripatetic manner. We recognize that in deciding this case we are limited by the parties' stipulation. We believe, however, that the peripatetic nature of Sankirtan is easily inferrable from the parties' explanation in their stipulation that the ritual is performed by 'going out into public places.'

Id., Petition for Writ of Certiorari, *at* A-7.

Also, during the *Bowen* litigation the District Court somehow determined that:

> The regulation, policy or resolution of the board is unconstitutional on its face and as applied to the plaintiffs insofar as it restricts their right to free exercise of their religion in denying them the opportunity to practice the required ritual of 'Sankirtan'. 'Sankirtan', by definition, cannot be practiced from the confines of a booth. . . (citations omitted.)

Id., 456 F. Supp. 437, 443.

However, these findings were based upon untested stipulations and, as more fully clarified during the trial of the *Barber* case in New York, these supposed findings are not necessarily correct or even true. For example, in *ISKCON v. Barber,* which is the only reported case in which the practice of Sankirtan was explored in any meaningful detail, a vastly different version of the practice of Sankirtan is described. *Id.*, 77-CV-328, *at* 8 *et seq.* In addition to providing a vastly different description of the theological underpinnings of the practice of Sankirtan, the court also clarifies the highly pronounced difference between the theological description of Sankirtan and how it was in fact practiced by the ISKCON members at the New York State Fair. *See e.g., ISKCON v. Barber, supra,* pp. 8-10 as compared to pp. 18-29 and 38-40.

The misrepresentation, fraud and deceit that was carried out by the ISKCON representatives at the New York State Fair, as more fully described by the *Barber* court, *supra,* is merely illustrative of some (but not all) of the problems which could, and surely would, arise if various roving solicitors were allowed to "work a crowd" at any time and place of their choosing. The fact that roving solicitors, via

claim of First Amendment rights or otherwise, can engage in any behavior of their choosing at any time, and thereafter disappear into the crowd is simply another example of why the booth rule is a necessity upon a fairgrounds. The argument that the criminal process can be used to solve this potential problem if the booth rule were to be invalidated is both naive and unrealistic. In a sense, that is like always having to "catch the horse because the law forbids closing of the barn door." Common sense dictates a more appropriate rule, *i.e.,* the booth rule.

Further, in deciding whether ISKCON members or, for that matter, anyone should be entitled to exercise their alleged First Amendment rights in a manner which would accrue to the obvious detriment of all other participants *at a fair,* it is necessary to question whether the First Amendment actually contemplates such an extended application of its principles or whether this would not, in fact, constitute a seriously distorted view of its purpose and spirit. Again, common sense and logic compel the conclusion that the booth rule is not violative of constitutional principles in the setting in which it is employed.

Thus, it is the position of Amicus that even if the ISKCON religion theoretically prompts its followers to go into public places and proselytize, sell, and solicit, it does not require or entitle them to go upon a fairgrounds and engage in roving solicitation in violation of the longstanding booth rule. In view of the evidence presented in *Barber, supra,* it is highly debatable that the ISKCON religion actually "requires" this behavior of its members and, even if it does require them to go into public places, such as a fair, and engage in the practice of Sankirtan, it is undeniably obvious that they can subscribe to their religious beliefs while at the same time operating from a specific stationary location such as would be required by application of the

booth rule.[8] After all, they would still be in a public place, practicing the tenet of Sankirtan (as more fully described by the *Barber* court, *supra*) and would yet be subject to some limited degree of regulation which would surely accrue to the benefit of the many other persons interested in the operation of the fair.

[8]Assuming *arguendo* that the self-serving testimony offered by modern day Krishnas that their religious beliefs require them to go into public places and solicit for funds is theologically accurate, this does not mean that the state or this Court must thereafter allow such conduct at any time or any place merely because it is associated in the mind of the believer with his system of religious beliefs. This Court has allowed the state to place various regulations on rights associated with religious beliefs (*e.g.*, polygamy, bigamy or smoking marijuana) and there is no reason to conclude that some minor regulation of ISKCON's religious practices in public places is beyond the realm of tolerable regulation because of constitutional considerations. *See e.g., Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1879), and, *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

CONCLUSION

The Minnesota Supreme Court's decision in the instant case is contrary to law and should be reversed.

For the reasons set out herein, the "booth rule" utilized by the Minnesota State Fair, or any fair, serves a legitimate and significant public interest and is a necessary and reasonable regulation consistent with applicable First Amendment standards.

Therefore, the "booth rule'" should be pronounced constitutional.

Respectfully submitted,

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